

JERMAINE S. EWING,)
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Plaintiff,)
)
v.) No. 4:09CV392 HEA
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JAMES PURKETT, et al.,)
)
Defendants.)

This matter is before the Court upon the motion of plaintiff (registration no. 517914), an inmate at Southeast Correctional Center, for leave to commence this action without payment of the required filing fee [Doc. #2]. For the reasons stated below, the Court finds that plaintiff does not have sufficient funds to pay the entire filing fee and will assess an initial partial filing fee of \$9.75. See 28 U.S.C. § 1915(b)(1). Furthermore, based upon a review of the complaint, the Court finds that the complaint should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B).

Pursuant to 28 U.S.C. § 1915(b)(1), a prisoner bringing a civil action in forma pauperis is required to pay the full amount of the filing fee. If the prisoner has insufficient funds in his or her prison account to pay the entire fee, the Court must assess and, when funds exist, collect an initial partial filing fee of 20 percent of the

greater of (1) the average monthly deposits in the prisoner's account, or (2) the average monthly balance in the prisoner's account for the prior six-month period. After payment of the initial partial filing fee, the prisoner is required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. 28 U.S.C. § 1915(b)(2). The agency having custody of the prisoner will forward these monthly payments to the Clerk of Court each time the amount in the prisoner's account exceeds \$10, until the filing fee is fully paid. Id.

Plaintiff has submitted an affidavit and a certified copy of his prison account statement for the six-month period immediately preceding the submission of his complaint. A review of plaintiff's account indicates an average monthly deposit of \$48.75, and an average monthly balance of \$45.90. Plaintiff has insufficient funds to pay the entire filing fee. Accordingly, the Court will assess an initial partial filing fee of \$9.75, which is 20 percent of plaintiff's average monthly deposit.

28 U.S.C. § 1915(e)

Pursuant to 28 U.S.C. § 1915(e)(2)(B), the Court may dismiss a complaint filed in forma pauperis if the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is immune from such relief. An action is frivolous if "it lacks an arguable basis in either law or in fact." Neitzke v. Williams, 490 U.S. 319, 328 (1989). An action is malicious when it is

undertaken for the purpose of harassing litigants and not for the purpose of vindicating a cognizable right. Spencer v. Rhodes, 656 F. Supp. 458, 461-63 (E.D.N.C. 1987), aff'd 826 F.2d 1059 (4th Cir. 1987).

To determine whether an action fails to state a claim upon which relief can be granted, the Court must engage in a two-step inquiry. First, the Court must identify the allegations in the complaint that are not entitled to the assumption of truth. Ashcroft v. Iqbal, — S. Ct. —, 2009 WL 1361536 *13, 14 (2009). These include “legal conclusions” and “[t]hreadbare recitals of the elements of a cause of action [that are] supported by mere conclusory statements.” Id. at *13. Second, the Court must determine whether the complaint states a plausible claim for relief. Id. This is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Id. The plaintiff is required to plead facts that show more than the “mere possibility of misconduct.” Id. The Court must review the factual allegations in the complaint “to determine if they plausibly suggest an entitlement to relief.” Id. at *14. When faced with alternative explanations for the alleged misconduct, the Court may exercise its judgment in determining whether plaintiff’s proffered conclusion is the most plausible or whether it is more likely that no misconduct occurred. Id. at *13, 15.

The Complaint

Plaintiff brings this action pursuant to 42 U.S.C. § 1983 alleging violations of his civil rights. Named as defendants are: James Purkett (correctional officer); Tom Villimer (A.S.O.M.); Mike Lundy (Superintendent); Steve Long (Asst. Director); Unknown Lane (C.S.I.); Unknown Birch (correctional officer); John Bain (unit manager); Keith Pona (correctional officer); John Brinkman (C.C.A.); Douglas Montgomery (C.C.A.); Jamie Crump (unit manager); Dana Ellis (correctional officer); Anna Kenoyer (correctional officer); Jim McDaniels (C.C.A.); David Boyd (A.M.E.); Unknown Settles (correctional officer); Jenny Lewis (C.S.I.); Patricia Cornwell (Deputy Director); Steve Larkins (Deputy Warden); Thomas Pearson (unit manager); William Nickelson (C.C.A.); Clare Stadt (C.C.W.); Mary Thorne (correctional officer); Tina Wier (correctional officer); Unknown Employee (#24121); Cynthia Slinkand (correctional officer); and Kerry Kline (C.C.W.). The complaint seeks monetary relief.

Plaintiff alleges that Kenoyer, a female correctional officer, conducted a strip search of plaintiff on April 19, 2005. Plaintiff alleges that the supervisory defendants violated his rights because they allowed the strip search to occur or because they denied his grievances relating to the incident. Plaintiff claims that several of the defendants violated his rights by placing him in administrative segregation.

Discussion

The complaint is silent as to whether defendants are being sued in their official or individual capacities. Where a “complaint is silent about the capacity in which [plaintiff] is suing defendant, [a district court must] interpret the complaint as including only official-capacity claims.” Egerdahl v. Hibbing Community College, 72 F.3d 615, 619 (8th Cir. 1995); Nix v. Norman, 879 F.2d 429, 431 (8th Cir. 1989). Naming a government official in his or her official capacity is the equivalent of naming the government entity that employs the official, in this case the State of Missouri. Will v. Michigan Dep’t of State Police, 491 U.S. 58, 71 (1989). “[N]either a State nor its officials acting in their official capacity are ‘persons’ under § 1983.” Id. As a result, the complaint fails to state a claim upon which relief can be granted.

Several of the allegations in the complaint were previously brought by plaintiff, and those allegations were dismissed for failure to state a claim upon which relief can be granted. See Ewing v. Purkett, 4:05CV1766 HEA (E.D. Mo.). To the extent that the allegations overlap those previously brought by plaintiff, they must be dismissed as duplicative. Cooper v. Delo, 997 F.2d 376, 377 (8th Cir. 1993).

Plaintiff’s allegations regarding the denial of grievances fail to state a claim upon which relief can be granted because an inmate does not have a constitutional right to the redress of grievances.

An inmate who makes a due process challenge to his placement in administrative segregation must make a threshold showing that the deprivation of which he complains imposed an “atypical and significant hardship . . . in relation to the ordinary incidents of prison life.” Sandin v. Conner, 515 U.S. 472, 484 (1995). Plaintiff’s allegations do not indicate that he suffered the type of atypical and significant hardship that might conceivably give rise to a liberty interest. Id. At 485-86 (no atypical and significant hardship where inmate spent 30 days in solitary confinement): Hemphill v. Delo, 124 F.3d 208 (8th Cir. 1997) (unpublished) (same; 30 days in disciplinary segregation, and approximately 290 days in administrative segregation); Wycoff v. Nichols, 94 F.3d 1187, 1190 (8th Cir. 1996) (same; 10 days disciplinary detention and 100 days in maximum security cell). As a result, the allegations relating to plaintiff’s placement in administrative segregation fail to state a claim upon which relief can be granted.

For these reasons, the complaint will be dismissed pursuant to 28 U.S.C. § 1915(e).

Accordingly,

IT IS HEREBY ORDERED that plaintiff’s motion to proceed in forma pauperis [Doc. #2] is **GRANTED**.

IT IS FURTHER ORDERED that the plaintiff shall pay an initial filing fee of \$9.75 within thirty (30) days of the date of this Order. Plaintiff is instructed to make

his remittance payable to “Clerk, United States District Court,” and to include upon it: (1) his name; (2) his prison registration number; (3) the case number; and (4) that the remittance is for an original proceeding.

IT IS FURTHER ORDERED that the Clerk shall not issue process or cause process to issue upon the complaint because the complaint is legally frivolous or fails to state a claim upon which relief can be granted, or both.

IT IS FURTHER ORDERED that plaintiff’s motion for appointment of counsel [Doc. #4] is **DENIED** as moot.

An Order of Dismissal will accompany this Memorandum and Order.

Dated this 27th day of May, 2009.



HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE